Nos. 83-812 and 83-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WALLACE, *et al.*,

Appellants

v.

JAFFREE, *et al.*,

Appellees

and

SMITH, *et al.*,

Appellants

v.

JAFFREE, *et al.*,

Appellees

Appeal from the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF APPELLANT, GEORGE C. WALLACE

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QUESTION PRESENTED

1. Whether a state statute which permits teachers in public schools to observe a short period of silence for meditation or voluntary prayer has the predominant effect of advancing students' liberty of religion and of mind rather than any effect of establishing a religion.

THE PARTIES

The appellants in the Court of Appeals in both cases were: Ishmael Jaffree, Jamael Aakki Jaffree, Makeba Green, and Chioke Saleem Jaffree, infants by and through their best of friend and father, Ishmael Jaffree.

The appellees in the Court of Appeals who are now appellants in 83-812 are: George Wallace in his official capacities as Governor of the State of Alabama and ex officio member of the State Board of Education; Charles Graddick, in his official capacity as Attorney General for the State of Alabama; John Tyson, Jr., Ron Creel, S.A. Cherry, Ralph Higgenbotham, Victor P. Poole, Harold C. Martin, James B. Allen, Jr., and Roscoe Roberts, Jr., in their official capacities as members of the Alabama State Board of Education.

The Intervenor-Appellees in the Court of Appeals who are now appellants in 83-929 numbered approximately six hundred individuals. They have been designated in lower Court documents as "Douglas T. Smith, et al." and are listed in their brief.

Appellees in a companion case in the Court of Appeals applied for certiorari in 83-7047, which was denied on April 2, 1984. They were as follows: the Board of School Commissioners of Mobile County; Dan C. Alexander, Dr. Norman Berger, Hiram Bosarge, Norman G. Cox, Ruth F. Drago, and Dr. Robert Gilliard, in their official capacities as members of the Board of School Commissioners of Mobile County; Dr. Abe L. Hammons, in his official capacity as Superintendent of the Board of Education of Mobile County; Annie Bell Phillips, individually and in her official capacity as principal of Morningside Elementary School; Julia Green, individually and in her official capacity as a teacher at Morningside Elementary School; Betty Lee, individually and in her official capacity as principal of E.R. Dickson Elementary School; Charlene Boyd, individually and in her official capacity as a teacher

at E.R. Dickson Elementary School; Emma Reed, individually and in her official capacity as principal of Craighead Elementary School; Pixie Alexander, individually and in her official capacity as a teacher at Craighead Elementary School.

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OPINIONS BELOW

The opinion of a panel of the U.S. Court of Appeals for the Eleventh Circuit, dated May 12, 1983, is reported at 705 F.2d 1526 (1983) and set out at J.S. 1a.* A dissenting opinion to the denial of a rehearing en banc in

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* J.S. refers to appendix to Jurisdictional Statement.

J.A. refers to the Joint Appendix.

A. refers to a separate appendix to Appellant's Brief.

the Eleventh Circuit, dated August 15, 1983, is reported at 713 F.2d 614 (1983) and set out at J.S. 1b.

The opinions of the district court in the two cases (later consolidated on appeal) dated January 14, 1983, are reported at 554 F. Supp. 1104 (1983) and 554 F. Supp. 1130 (1983) and are set out at J.S. 1d and J.S. 56d. An opinion by the district court, accompanying a preliminary injunction, dated August 9, 1982, is reported at 544 F. Supp. 727 (1982) and also set out at J.S. 64d. An opinion accompanying a stay order issued by Justice Powell, acting as Circuit Judge, is reported at —— U.S. ——, 103 S.Ct. 842 (1983) and set out as J.S. 1e.

JURISDICTION

The opinion of the U.S. Court of Appeals for the Eleventh Circuit was entered on May 12, 1983. The Court of Appeals denied a petition for a rehearing en banc on August 15, 1983. Notice of appeal was filed on September 26, 1983, J.S. 1f. The Appeal was docketed on November 14, 1983. The jurisdiction of the Court rests on 28 U.S.C. § 1254(2).

STATUTE INVOLVED

Alabama Code § 16-1-20.1 (1982):

> "At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in."

CONSTITUTIONAL PROVISIONS

AMENDMENT I (in pertinent part)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

AMENDMENT XIV (in pertinent part)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Ishmael Jaffree, on behalf of three of his minor children, filed suit in the U.S. District Court on May 28, 1982, seeking declaratory and injunctive relief against his children's public school teachers who regularly led their students in vocal classroom prayer. The teachers' activity was not pursuant to any state statute or school policy. There was at the time an Alabama statute which provides teachers "may announce . . . a period of silence not to exceed one minute in duration . . . for meditation or voluntary prayer." Alabama Code § 16-1-20.1 (1982). The plaintiffs did not initially challenge this statute. After plaintiffs filed suit, the Alabama legislature passed another statute, which provides teachers "may lead willing students in a prayer" which is set out in the statute. Alabama Code § 16-1-20.2 (former Alabama Act 82-735). In a second amended complaint adding the Governor of Alabama, the attorney general, and other state education authorities, Jaffree challenged the constitutionality of both statutes.

The district court severed Jaffree's complaint into two causes of action: one related to those teachers' activities unmotivated by the statutes, and the other related to the statutes. Following the severance, the court issued a preliminary injunction against the implementation of the Alabama school prayer statutes. *Jaffree By and Through Jaffree v. James*, 544 F.Supp. 727 (S.D. Ala., 1982) (J.S. 64d). After trial on the merits, the district court dismissed both actions, thereby dissolving the preliminary injunction. *Jaffree v. Board of School Commissioners of Mobile County*, 554 F.Supp. 1104 (S.D. Ala., 1983) (J.S. 1d). *Jaffree v. James*, 554 F.Supp. 1130 (SD. Ala., 1983 (J.S. 56d). Pending appeal, Jaffree filed an emergency motion for stay and injunction in the Eleventh Circuit Court of Appeals, which was denied (J.S. 1c). Jaffree requested Justice Powell, in his capacity as Eleventh Circuit Justice, to stay the trial court's order or reinstate the preliminary injunction previously issued by the district court. In a memorandum opinion, Justice Powell granted the stay and reinstated the injunction pending final disposition of the appeal in this case (J.S. 1e).

On appeal, the Eleventh Circuit Court of Appeals consolidated the two cases, reversed the district court's dismissal of the actions, declared both statutes and the teacher-initiated prayer activity unconstitutional and directed the district court to enjoin both statutes and the teacher activity (J.S. 1a). A petition for rehearing was denied, with four judges dissenting from the denial (J.S. 1b). On October 14, 1983, the district court entered an injunction against the statutes and the teaching activity.

Your appellants sought review in this Court of both statutes declared unconstitutional. On April 2, 1984, this Court affirmed the judgment of the Court of Appeals regarding Ala. Code § 16-1-20.2, a statute specifying that a particular prayer was authorized to be said in all Alabama schools. This Court noted probable jurisdiction as to the second Alabama statute, Ala. Code § 16-1-20.1, which provides that a public school teacher may provide up to one "minute of silence for meditation or voluntary prayer."

SUMMARY OF ARGUMENT

This Court has indicated that, read together, the Religion Clauses require certain accommodations and permit others that may not be required. The three-part, purpose-effect-entanglement test, if rigidly applied without reference to other relevant factors, forecloses virtually every accommodation of religion. While another lower federal court has upheld a statute almost identical to Alabama's meditation-or-voluntary prayer statute pursuant to the three-part test, this type of statute is best understood as a permissible accommodation of religion. Viewed in terms of permissible accommodations, or even in terms of the three-part test, Alabama's meditation-or-voluntary prayer statute conforms to acceptable constitutional criteria.

1. Nothing the Court said in *Engel v. Vitale*, 370 U.S. 421 (1962), or *Abington School District v. Schempp*, 374 U.S. 203 (1963), indicates that providing a period of silence for public school children in which they may meditate, pray, or—if they choose—daydream in any way offends the Constitution. Such a statute avoids the evils which concerned the Court in those cases because the statute 1) neither prescribes prayer; 2) nor affirms religious belief; 3) nor coerces any religious exercise. Rather the statute implements the very type of "wholesome neutrality" prescribed in *Engel*.

The Eleventh Circuit Court of Appeals, which struck down Alabama's meditation-or-voluntary prayer statute, and other courts which have struck down other moment-of-silence statutes, have done so primarily on the basis that they violate the "purpose" prong of the three-part test. In doing so these courts have looked to the fact that the statute mentions the word "prayer" and to possible "motivations" of some of the statute's sponsors. They

have thereby over-extended the logic of the three-part test, a tendency which indicates the limited usefulness of the test.

2. In answering whether Alabama's meditation-or-voluntary prayer statute is a permissible accommodation of religion, it is well to measure the statute against the historical record. While these statutes themselves are of recent origin, we discuss at length in the body of the argument hitherto undeveloped facts demonstrating that Congress, in providing for the establishment of the public school systems in the land-grant states, explicitly sought to promote religion. By comparison, Alabama's meditation-or-voluntary prayer statute is a modest accommodation of religion. If it was not unconstitutional for Congress to have acted as it did, it would hardly seem that Alabama's statute could be considered unconstitutional.

3. The purpose of the Religion Clauses, read together, "is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which receive the best hope of attainment of that end." *Abington School District v. Schempp*, 374 U.S. 203, 305 (Goldberg, J., Concurring).

The logic of strict separation as applied by the lower federal courts has become hostile to the individually initiated attempts of students to exercise their religious liberty. Some lower federal courts have gone to the point of directing school administrators to prevent student-initiated prayer even outside the classroom. Administrators, fearing civil liability, have gone even further in suppressing the religious exercise of students as demonstrated by examples given in the full argument.

A coherent interpretation of the Religion clauses, which emphasizes accommodation, is necessary to reverse the erosion of the Free Exercise Clause. Alabama's meditation-or-voluntary prayer statute is the appropriate vehicle to do so because, while it may be viewed as presenting either an Establishment issue or a Free Exercise issue, it presents a more generalized Religion Clause issue.

ARGUMENT

A. The Eleventh Circuit Court Of Appeals Erred In Holding That Alabama's Meditation-Or-Voluntary-Prayer Statute Violates The Establishment Clause.

1. *The School Prayer Cases. Engel v. Vitale*, 370 U.S. 421 (1962), declared the prayer composed by the New York State Board of Regents a violation of the Establishment Clause for reasons which simply do not apply to a meditation-or-voluntary-prayer statute.[1] Justice Black's

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[1] The term "meditation-or-voluntary prayer" is used to describe the Alabama statute. The term "moment-of-silence" statute has been used as a generic term to categorize a variety of state statutes, including Alabama's, which provide periods of silence. *See generally* Note, "Daily Moments of Silence in Public Schools: A Constitutional Analysis," 58 N.Y.U. L. Rev. 364, (1983) and Note, "The Unconstitutionality of State Statutes Authorizing Moments of Silence in Public Schools," 96 Harv. L. Rev. 1874 (1983).

The following state statutes relate to moments of silence: Alabama, see Ala. Code § 16-1-20.1 (Supp. 1983); Arizona, see Ariz. Rev. Stat. Ann. § 15-522 (Special pamphlet 1983); Arkansas, see Ark. Stat. Ann. § 80-1607.1 (1980); Connecticut, see Conn. Gen. Stat. Ann. § 10-16a (West Supp. 1984); Florida, see Fla. Stat. Ann. § 233.062 (West Supp. 1984); Georgia, see Ga. Code Ann. § 20-a-1050 (1982); Illinois, see Ill. Ann. Stat. ch. 122, para. 771 (Smith-Hurd Supp. 1983-1984); Indiana, see Ind. Code Ann. § 20-10.1-7-11 (Burns Supp. 1983); Kansas, see Kan. Stat. Ann. § 72-5308a (1980); Louisiana, see La. Rev. Stat. Ann. § 17:2115(a) (West 1982); Maine, see Me. Rev. Stat. Ann., Tit. 20-A § 4805 (West 1983); Maryland, see Md. Educ. Code Ann. § 7-104 (1978); Massachusetts, see Mass. Gen. Laws Ann., ch. 71, § 1A (Supp. 1984); Michigan, see Mich. Comp. Laws Ann. § 380.1565 (West Supp. 1984-1985); New Jersey, see N.J. Stat. Ann. § 18a:36-4 (West Supp. 1983-1984); New Mexico, see N.M. Stat. Ann. § 22-5-4.1 (1981); New York, see N.Y. Educ. Law § 3029-a (McKinney 1981); North Dakota, see N.D. Cent. Code Ann. § 15-47-30.1 (1981); Ohio, see Ohio Rev. Code Ann. § 3313.60.1 (Page 1980); Pennsylvania, see Pa. Stat. Ann. Tit. 24, § 15-1516.1 (Purdon Supp. 1984-

opinion for the majority emphasized the elements of the Establishment Clause violation as follows: (1) the state "is without power to prescribe by law any particular form of prayer. . ."; *Id.* at 430; (2) by doing so, the state "establishes the religious beliefs embodied in the Regents' prayer." *Id.*; (3) although non-denominational and voluntary, the Regents' prayer involves "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion." *Id.* at 431. To the contrary, a meditation-or-voluntary-prayer statute: (1) neither prescribes nor proscribes prayer at all, much less a particular prayer; (2) neither affirms nor denies religious belief, much less a particular religious belief; and (3) coerces only silence on the part of all in the class.

Abington School District v. Schempp, 374 U.S. 203 (1963), in which reading from the Bible and recitation of the Lord's prayer in public school were declared unconstitutional, addressed "religious exercises," that had been "prescribed as part of the curricular activities," "held in the school buildings under the supervision and with the participation of teachers employed in those schools." 374 U.S. at 223. Resting "on a theory not advanced in *Engel*," the case emphasizes "wholesome neutrality" "as the central thesis for interpreting the establishment clause."[2] Not only does the meditation-or-voluntary-prayer statute not prescribe any religious exercises, as already noted; but it advances the very "wholesome neutrality" central to *Engel*.

At the time *Engel* and *Schempp* were decided, it appeared beyond serious question that a statute providing for a moment of silence was perfectly consistent with

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1985); Rhode Island, see R.I. Gen. Laws § 16-12-3.1 (1981); Tennessee, see Tenn. Code Ann. § 49-6-1004 (1983); Virginia, see Va. Code Ann. § 22.1-203 (1980).

[2] Kauper, *Religion and the Constitution* 64-65 (1964).

the Constitution. In *Schempp*, Justice Brennan implied that such a statute would not transcend the Constitution. 374 U.S. 281 and n.57 (Brennan, J., concurring).[3] Justice Brennan cited an article published the previous year by Professor Choper, which observed:

> Since each student could utilize this moment of silence for any purpose he saw fit, the activity may not be fairly characterized as solely religious, and since no student would really know the subject of his classmates' reflections, no one could in any way be compelled to alter his thoughts.[4]

Two other prominent scholars, Professors Kauper and Freund, writing in the sixties, noted briefly, as if there were not much question, that such statutes would be constitutional.[5] More recently, Professor Tribe has also affirmed the constitutionality of such statutes.[6]

2. *The Three-Part Test.* Although it may be terribly difficult to implement even a short period of silence in some of today's turbulent classrooms,[7] the necessity for

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[3] Appellants do not presume that Justice Brennan is bound by his prior statement nor that the Justice(s) might not distinguish between a moment-of-silence statute without the word prayer and Alabama's meditation-or-voluntary-prayer statute.

[4] Choper, "Religion in the Public Schools: A Proposed Constitutional Standard," 47 *Minn. L. Rev.* 329, 371 (1963).

[5] Kauper, "Prayer, Public Schools and the Supreme Court," 61 *Mich. L. Rev.* 1031, 1041 (1963); Freund, "The Legal Issue" in *Religion and The Public Schools* 23 (1965).

Freund states: "Nor does any decision, in my judgment, prevent a public school class from engaging in a moment of silent meditation or reverence, as the teachings of the individual spirit or inheritance may prompt." "The Legal Issue" at 23.

[6] L. Tribe, *American Constitutional Law* § 14-6 at 829 (1978).

[7] "In too many schools across the land, teachers can't teach because they lack the authority to make students take tests, hand in homework, *or even quiet down their class.*" President Ronald

periods of silence in any learning environment would seem to be self-evident. *See Disorder in Our Public Schools* at 3 (Jan. 9, 1984) (A White House Paper by the Depts. of Education and Justice and the Office of Management and Budget); See also *National Commission on Excellence in Education*, April, 1983. Nevertheless, four of the five lower courts to rule on moment-of-silence statutes have found that such statutes violate the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), according to which governmental action (1) "must have a secular legislative purpose;" (2) must have a "principal or primary effect . . . . that neither advances nor inhibits religion" and (3) "must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13.

Those courts which have ruled the moment-of-silence statutes unconstitutional have done so if *any* of its purposes might be characterized as religious, rather than inquiring whether any of the purposes might be characterized as secular. One case conceded "that a moment of silence in and of itself is nondiscriminatory and may serve a secular purpose in aid of the educative function", *Beck v. McElrath*, 548 F. Supp. 1161, 1163 (M.D. Tenn., 1982) appeal dismissed, vacated and remanded, 718 F.2d 1098 (6th Cir. 1983), but nevertheless found the statute failed the secular purpose part of the three-part test because "the legislative purpose was advancement of religious exercises in the classroom." *Id.* In another case, inclusion of the word "prayer" was deemed sufficient to negate a secular purpose. *Duffy v. Las Cruces Public Schools*, 557 F. Supp. 1013, 1015 (D.N.M., 1983). Even in the case of a state statute that did not include any reference to "prayer," the district court nevertheless found the purpose religious, dismissing the "omission of the word 'prayer' [as] a cosmetic change only, having no substantial effect", *May v. Cooperman*,

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Reagan at the National Forum on Excellence in Education, Indianapolis, Dec. 8, 1983 (emphasis added).

572 F. Supp. 1561, 1574 (D.N.J., 1983). In this case, the only Federal Court of Appeals yet to render an opinion that addresses the issue disposed of the issue in one paragraph which found a legislator's motive and the word "prayer" sufficient to invalidate the statute. (J.S. 18a).[8]

Whereas the statements of Justice Brennan in *Schempp* and of several prominent legal scholars suggest the unquestionable constitutionality of moment-of-silence statutes, a few lower court judges less steeped in the Religion Clause cases, have preemptorily concluded otherwise. The difficulty of reconciling this Court's decisions under the Religion Clauses probably inclines lower court judges to adopt a seemingly simple and safe—because respectable—approach of ruling against anything possibly connected to religion. In doing so, they fail to appreciate that "the Establishment Clause . . . is not a precise, detailed provision in a legal code capable of ready application." *Lynch v. Donnelly*, —— U.S. ——, 104 S.Ct. 1355, 1361-62. The result, which is condemned in *Lynch*, is that of "mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general . . ." 104 S.Ct. at 1361

Among many difficulties with the three-part test, the principal problems stem from the *purpose* prong.[9] The source of the major difficulty can be demonstrated by comparing the statement regarding "purpose" as it finally emerged in *Lemon*, 403 U.S. at 612-13, with its beginning in *Schempp*:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the *advancement or inhibition of reli-*

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[8] The attorney representing the Alabama Department of Education briefed and orally argued before the Eleventh Circuit only for the constitutionality of the meditation-or-voluntary-prayer statute, as distinguished from the state-composed-prayer statute.

[9] See Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict" 41 U. of Pitt. L. Rev. 673, 685 (1980).

> *gion* then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause *there must be a secular legislative purpose* and a primary effect that neither advances nor inhibits religion. 374 U.S. 222 (emphasis added)

Whereas it may be clear to nearly all that the purpose of a moment of silence is not "the advancement or inhibition of religion," others may disagree whether there is a clearly-demonstrated "secular purpose." Although *Schempp* states the purpose prong in alternate formulations that are intended to equate with one another, later statements of the test do not. As currently stated, the purpose test puts the burden on the defenders of the statute in such a way as to rule out any attempt to accommodate religion, even one required by the Free Exercise Clause. See *Sherbert v. Verner*, 374 U.S. 398 (1963).

Although the statement of the test in *Schempp* might be ambiguous because of the alternate phrasing, the current statement is also ambiguous because it depends on the interpretation of the word "secular." If taken literally, the "secular purpose" prong "would make virtually *all* accommodations for religion unconstitutional." [10] "[I]f a purpose were to be classified as non-secular simply because it coincided with the beliefs of one religion or took its origin from another, virtually nothing that government does would be acceptable . . . ." [11] Not surprisingly, therefore, this Court has invalidated only two statutes primarily under the purpose prong of the three-part test. See *Epperson v. Arkansas*, 393 U.S. 97 (1968), holding unconstitutional a state statute prohibiting the teaching of evolution; *Stone v. Graham*, 449 U.S. 39 (1980), holding unconstitutional a state statute requiring the posting of the Ten Commandments in public school classrooms. The Court has refused "to construe the Reli-

[10] *Id.*

[11] Tribe, *supra*, n. 6 at 835.

gion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history.*" *Lynch*, 104 S.Ct. at 1361, citing *Walz v. Tax Commission*, 397 U.S. 664, 671 (1979) (emphasis supplied in *Lynch.*)

Despite the fact that this Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area . . ." *Lynch*, 104 S.Ct. at 1362, citing *Tilton v. Richardson*, 403 U.S. 672, 677-678; *Com. for Public Education v. Nyquist*, 413 U.S. 756, 1773 (1973), some lower courts have not only rigidly adhered to the test but, as in the case of moment-of-silence statutes, expanded the test at the expense of the Free Exercise Clause. Such a searching for religious motives distorts the three-part test and demonstrates hostility to religion. Although this Court has applied a "strict scrutiny" test to the Establishment Clause, *Larson v. Valente*, 456 U.S. 228 (1982), it has done so in the context of a state statute that imposed onerous legal obligations on some religions but not on others, a situation not applicable in this case. More generally, this Court has been "reluctan[t] to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller v. Allen*, —— U.S. ——, 103 S.Ct. 3062, 3066 (1983). To say a statute is unconstitutional *if it does not have a secular purpose* is significantly different from saying it is unconstitutional *if it has any religious purpose.* The latter approach creates the impression that a religious purpose is an unconstitutional purpose. A search for religious purpose subtly shifts toward a process of rooting out religiously motivated action.[12]

[12] *McRae v. Califano*, 491 F.Supp. 630, 741 (E.D. N.Y., 1980), in which a district court declared Congressional limits on abortion funding unconstitutional, rejected an Establishment Clause claim based on the alleged lack of a secular purpose even while recognizing the religious sponsorship of the legislation. This Court, in reversing, also rejected the Establishment Clause claim without

Although distortions fostered by focusing on "motive" may not be apparent to a lower court considering only a single statute, the dilemma for this Court dealing with similar statutes from different legislatures becomes quite clear. In *Gaines v. Anderson*, 421 F. Supp. 337 (D.Mass., 1976), the three-judge court found that the legislative history and the statutory language demonstrated a secular purpose. 421 F. Supp. at 341. The language of the Massachusetts statute and the Alabama statute are virtually identical, although Alabama's employs slightly more permissive language.[13] The Eleventh Circuit, however, invalidated the Alabama statute because "the intent of this statute was to return prayer to public schools." J. S. 18a. Senator Holmes, the bill's author, testified that his purpose in sponsoring § 16-1-20.1 was "to return voluntary prayer to the public schools." He intended to provide children "the opportunity of sharing in their spiritual heritage of Alabama and of this country." J.A. 50. See also the Alabama Senate Journal 921 (1981). J.A. 67. (P-3 adm. T. 73) Assuming arguendo that Senator Holmes had no other *motive*, which we do not concede,[14] we submit that the constitutionality of identically worded statutes should not turn on the vagaries of motives from one legislature to another.[15]

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inquiring into the motive or purpose but by focusing only on the effect. *Harris v. McRae*, 448 U.S. 297 (1980). Even the district court in *McRae*, however, recognized that the consequences of equating a finding of the sponsors' religious motivation with a violation of the Establishment Clause would be to preclude religious leaders from participation in the political process because they would fear their support for a bill would guarantee a declaration of unconstitutionality. 491 F.Supp. at 741.

[13] The Massachusetts statute was mandatory on the teacher, see 421 F.Supp. at 340, n. 4, whereas Alabama's is not.

[14] While Senator Holmes, a non-lawyer, stated he had "no other purpose" than to restore *voluntary* prayer, T. 65 (J.A. 52), he also stated that he intended to clarify the right of students to pray on their own. T. 68 (J.A. 54).

[15] In *May v. Cooperman*, the Court noted that the American Baptist Churches of New Jersey had opposed the moment-of-

Moreover, what another court has construed to be an attempt "to evade *Engel* and *Abington Township*," *May v. Cooperman*, 572 F. Supp. at 1572 (1983), may only have been a genuine attempt to fit within the often conflicting constitutional tests under the Free Exercise and Establishment Clauses. At the time Senator Holmes sponsored the Alabama statute, the only Court to have ruled had declared the wording that he employed to be constitutional. *Gaines v. Anderson, supra.* Indeed, the leading constitutional hornbook, relying on *Gaines*, matter-of-factly has stated such statutes are constitutional. Tribe, *Constitutional Law*, § 14-6, at 829 (1978). It would have appeared in 1981 to most, except those simply opposed to any public act even remotely connected with religion, that the Alabama statute was constitutional. Although certain lower courts have since disagreed, there appears to have been a preconception on their part that a possible religious motivation precludes any other motivation. Not only does such a one-dimensional view of human nature naively ignore the various political motivations of elected officials, more significantly it assumes the inconsistency of religious motivation and a concern for constitutional government. The absurdity of this implicit assumption is apparent when applied to the motivations of those responsible for the First Amendment itself.

Certain lower courts, to apply the words of Justice (then Judge) Cardozo, have pressed the three-part test beyond "the limits of its logic."[16] Although the secular purpose of the statute has been defended in *Gaines*, we consider such an approach to obscure the analysis and only to exacerbate the misconceptions that persist among

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silence statute on religious grounds. 572 F.Supp. at 1565. If, in a subsequent legislative session, the Baptist Churches had successfully sponsored legislation repealing the moment-of-silence statute, the repeal would be subject to challenge due to the *motives* of the sponsors under the court's analysis.

[16] Cardozo, *The Nature of the Judicial Process* 49 (1921).

some of the lower courts. The lower courts need clearer guidance on the limits of separation which, as discussed below, can only be achieved by construing the Religion Clauses together as part of a clearly conceived and articulated theory of accommodation. With Professor Paul Freund, we believe that this Court's decision on moment-of-silence statutes will turn, not on particular tests, but upon this Court's conceptualization of the issue as either one of Establishment or Free Exercise.[17]

If the three-part test is to continue in use it should be modified in one of several possible ways. Our statement of the issue, which assumes a reading of the Free Exercise and Establishment Clauses together, considers whether the government's action has a "predominant effect" that advances Free Exercise. This suggestion is similar in some respects to Dean Choper's suggestion of a test that would forbid government action whose purpose is "solely religious" and that is likely to impair religious freedom by coercing, compromising, or influencing religious beliefs.[18] Professor Tribe has also suggested upholding any action that is "arguably non-religious."[19]

B. Alabama's Meditation-Or-Voluntary-Prayer Statute Represents A Modest Accommodation Of Religion Consistent With Past Congressional Provisions For Public Education In The Land-Grant States.

"The Enabling Act of each of the public-land States admitted into the Union since 1802 has included grants of designated sections of federal lands for the purpose of supporting public schools." *Andrus v. Utah*, 446 U.S. 500, 506 (1980) (footnote omitted). These acts were based on the admission of Ohio in 1802-1803, whereby

[17] Freund, "Storms Over the Supreme Court," 69 A.B.A.J. 1474, 1480 (Oct. 1983).

[18] Choper, *supra*, n. 4 at 330.

[19] Tribe, *supra*, n. 6 at 831.

"Congress enacted a compromise drawn from the Land Ordinance of 1785 and the Northwest Ordinance of 1787. . . . [which] set a pattern followed in the admission of virtually every other state." *Id.* at 522 (Powell, J., dissenting) (footnotes omitted).

In these organic acts related to the Northwest Territory, Congress promoted religion as an integral part of public education. Following the Ordinance of 1784 regarding territorial government,[20] the Continental Congress in the Land Ordinance of 1785 "reserved the lot No. 16, of every township . . .," Ordinance of May 20, 1785, 1 Laws of the United States 563, 565, (1815) (A. 8a, 12a-13a). At the same time, the Act reserved Sections 8, 11, 26, and 29 to the United States. *Id.* An earlier draft specified the section adjoining Section 16 in each township be reserved "for the support of religion . . . . to be applied forever according to the *will of the majority* of male residents . . ." 28 Journal of the Continental Congress, 251, 255 (Library of Congress ed. 1933) (emphasis added) (A. 1a, 5a). Although the Land Ordinance as enacted did not contain that provision, subsequent acts pursuant to the Act did reserve lot No. 29 "for purposes of religion." The Northwest Ordinance itself, enacted July 13, 1787, did relate religion and public schools in the same article:

> Art. 3. Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. Ordinance of July 13, 1787,

[20] The Ordinance of 1784, which was never actually implemented, resulted from the report of a committee chaired by Thomas Jefferson. Historians dispute the extent of Jefferson's influence on the Act. The 1784 Ordinance was repealed by the Ordinance of 1787, which has been characterized as an extension and replacement, rather than a repudiation of the Ordinance of 1784. *See* R. Berkhofer, "Jefferson, The Ordinance of 1784 and the Origins of the American Territorial System" 29 *William and Mary Quarterly* 231 n. 1, 261 (1972).

1 Laws of the United States, 475, 479, (1815); Laws of the United States—Relating to the Public Lands, 356, 360, No. 32 (1828) (A. 21a, 26a-27a).

Then on July 23, 1787, acting pursuant to the Land Ordinance of 1785, Congress specified that Section 29 would be used for *purposes of religion* but did not make any reference to the "will of the majority":

> The lot No. 16, in each township or fractional part of a township, to be given perpetually for the purposes contained in the said ordinance. *The lot No. 29,** in each township or fractional part of a township, *to be given perpetually for the purposes of religion.* (emphasis added) Powers to the Board of Treasury to contract for the sale of Western Territory, 1 Laws of the United States 573 (1815); Laws of the United States—Relating to the Public Lands 362, No. 33 (1828) (A. 33a).

The Continental Congress pursued this same policy in other acts relating to the territories. In September, 1788, noting that certain acts previously passed had "omitted making any grants of land for Supporting Religion and for Schools of education as had been done in the Sales of Land in the western territory," the Congress resolved that tracts be set aside "forever to the sole and only use of Supporting the ministry of Religion in such Village, and the other of said tracts to remain in a like manner for supporting Schools of education . . ." 34 Journal of the Continental Congress, 540, 541-542 (Library of Congress ed., 1933).[21] (A. 43a, 44a). On September 3, 1788,

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* An editorial note in the 1815 compilation states: "This grant of No. 29, for religious purposes, is confined to the Ohio Company's purchase and to John Cleves Symmes' patent." 1 Laws of the United States 573 (1815).

[21] This resolution refers back to the Acts of Congress from June 20, 1788, and August 29, 1788. In later compilations of laws, the Act of June 20, 1788, does reflect this reservation of Section 29 "for purposes of religion." 1 Laws of the United States 580, 581 (1815); Laws of the United States—Relating to the Public Lands 393, 394 (1828). (A. 36a, 37a). The Act of August 29, 1788, as printed in the compilations, does not reflect inclusion. 1 Laws of the United States 584 (1815); Laws of the United States—Relating to the Public Lands 398 (1828). (A. 41a).

the Congress voted land to the "United Brethren, or the Society of the said Brethren for *propagating the Gospel among the Heathen* . . ." 1 Laws of the United States, 579, 580 (1815); Laws of the United States—Relating to the Public Lands, 399, 400 (1828) (emphasis added) (A. 46a).

After adoption of the Constitution, the First Congress gave "full effect" to the Northwest Ordinance, subject to "certain provisions . . . to adapt the same to the present Constitution of the United States." Act of August 7, 1789, 1 Stat. 50, 51. c. 7 (A. 48a). Although this same Congress proposed the First Amendment, it did not change any of the provisions in the Ordinance related to religion. Article III of the Ordinance, acknowledging the interrelationship of religion, morality, and knowledge to schools, remained unaltered. In 1792 Congress confirmed the grant to John Symmes previously authorized. Act of May 5, 1792, 1 Stat. 266, c. 30 § 1; Laws of the United States—Relating to the Public Lands, 373 (1828). (A. 56a). In 1794 President Washington awarded a patent to Symmes, the consent to the modification of which and the patent itself confirmed that lot No. 29 was given *for the purposes of religion.*[22] *Consent of the President to the above petition,* Laws of the United States—Relating to Public Lands, 376, 378 (1928); *J. C. Symmes's*

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[22] The Act of May 5, 1792, which authorized the President to issue a letter of patent to John Cleves Symmes, simply refers back to previous authorizations without reference to the reserved lots. Laws of the United States—Relating to the Public Lands 373-374 (1828). The President's consent to a modification (A. 63a, 66a), and his confirmation of the patent on September 30, 1794 (A. 68a, 70a), did reserve lot No. 29 for "purposes of religion." 1 Laws of the United States 497, 499 (1815); Laws of the United States—Relating to the Public Lands 376, 378, 379, 381 (1828).

Patent, Laws of the United States—Relating to the Public Lands, 379, 381 (1828); 1 Laws of the United States, 497, 499 (1815).[23] As the Continental Congress had done, the Congress of the United States in 1796 confirmed the land grants to the "United Brethren for propagating the Gospel among the Heathen." Act of June 1, 1796, 1 Stat. 490, 491, c. 46 § 1 (A. 60a). Congress again affirmed these grants for propagating religion in 1802 and 1803. Laws of the United States—Relating to the Public Lands, 473, 491, No. 95 and No. 103 (1828).[24] (A. 89a & 91a). Moreover, after President Washington requested that missionaries teach the Indians "the great duties of religion and morality, and to inculcate a friendship and an attachment to the United States," [25] Congress voted funds for missionaries to teach the Indians.[26] Congress continued to make grants to religious sects for educating Indians until a change in policy in 1896.[27] See *Quick Bear v. Leupp*, 210 U.S. 50 (1907).

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[23] Only the 1828 edition contains Washington's consent on September 13, 1794, to a modification of John Cleves Symmes's patent. Laws of the United States—Relating to the Public Lands 376, 378 (1828).

[24] In discussing these grants to the United Brethren, Professor Cord summarizes: "The United States government in effect purchased, with grants of land amounting up to 12,000 acres placed in a controlling trust, the services of a religious evangelical order to settle western U.S. lands to aid the Christian Indians. This action was tantamount to underwriting the maintenance and spreading of Christianity among the Indians." R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 43 (1982); Book note in 97 Harv. L. Rev. 1509 (1984). Intervenors Ex. No. 14, on file with the Clerk's Office.

[25] President Washington's "Instructions to the Commissioners for Treating with the Southern Indians," August 29, 1789. 4 *American State Papers*, "Indian Affairs", vol. 1, serial set no 7, p. 65, 66 (Lourie and Clark ed. 1832). (A. 73a, 80a).

[26] J. O'Neill, *Religion and Education Under the Constitution* 116-119 (1949).

[27] *Id.* at 118-119.

This Court has characterized the federal government's grants to each state as "a 'solemn agreement' which in some ways may be analogized to a contract between private parties." *Andrus v. Utah*, 446 U.S. at 507. Thus, when Ohio was admitted to the Union, it carried out its responsibilities pursuant both to the Northwest Ordinance and the land grants. First, its Constitution followed language in the Northwest Ordinance, combining the religious freedom provision of Section 1 and the religion and schools provision of Section 3 of the Northwest Ordinance.

> Sec. 3. That all men have a natural and indefeasible *right to worship Almighty God according to the dictates of their conscience; that no human authority can, in any case whatever, control or interfere with the rights of conscience*; that no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; and that no preference shall ever be given by law to any religious society or mode of worship, and no religious test shall be required, as a qualification to any office of trust or profit. *But religion, morality, and knowledge being essentially necessary to the good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience.* Thorpe, 5 *American Charters, Constitutions and Organic Laws* (1909) p. 2901, 2910 (emphasis added)

Second, as specified by Congress in the original grant of land, Ohio preserved Section 29 lands for purposes of religion in a series of acts.[28] Reflecting Congress' dele-

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[28] For a discussion of section 16 and 29 lands in Ohio, see S. Chase, "A Preliminary Sketch of the History of Ohio," in 1 *Statutes of Ohio and the Northwest Territory* 2, 20, 28, 32 (S. Chase ed. 1833). The following Ohio statutes through 1833 refer to Section 29 lands. 1 *Statutes of Ohio and of the Northwest Territory* 361, c. 11 (1803), 526 c. 118 (1806), 555 c. 137 (1806), 637 c. 198 (1809), 665 c. 221 (1810) (S. Chase ed. 1833); 2 *Statutes of Ohio and of the Northwest Territory* 767 c. 267 (1812), 121 c. 546

tion of the designation of the funds according to the will of the majority, the state of Ohio divided the proceeds *equally among all religious societies* as indicated in an 1824 statute which provided:

> An Act to incorporate the original surveyed townships.
>
> § 1. *Be it enacted, &c.* That so soon as there are twenty electors in any original surveyed townships, of five or six miles square, or fractional township wherein there are either the *reserved section, twenty-nine or sixteen, or where said section number sixteen has been disposed of by congress,* . . .
>
> . . .
>
> § 10. *That each and every denomination of religious societies,* after giving themselves a name, shall appoint an agent, who shall produce to the trustees a certificate containing a list of their names and numbers, specifying that they are citizens of said township; and the *agent shall pay over an equal dividend of the rents,* within three months after the same shall have been received, *to be appropriated to the support of religion at the discretion of each society,* or be entitled to a portion of said rents: *Provided,* that all members above the age of fifteen years, shall be entitled to have their names enrolled by any society.
>
> . . .
>
> § 12. That in such township or fractional townships wherein *section twenty-nine* is reserved, it shall be the duty of the trustees to meet on the first Monday of January annually, at the most convenient place nearest the centre of such township or fractional township, and there *make a dividend of the*

(1822), 1450-52 c. 638 § 9, 10 (1824) (S. Chase ed. 1934); 3 *Statutes of Ohio and of the Northwest Territory* 1898-99 c. 894 § 11 (1831) (S. Chase ed. 1835); 3 *Statutes of Ohio and of the Northwest Territory* 2166-68, c. 794-814 (1799-1832); 2220-27, c. 1660-1770 (1800-1833) (S. Chase ed. 1835).

> *rents to each religious society,* agreeably to the tenth section of this act; and in making such dividend, each society shall be entitled to receive a just proportion of the money or grain received by the treasurer, in such proportion as each article in the hands of the treasurer shall make necessary.
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> 2 Statutes of Ohio and of the Northwest Territory, 1450, 52, c. 638 (1824). (Ed. by Salmon P. Chase, 1834) (emphasis added)

Alabama, has honored its "compact."[29] The state has preserved Section 16 lands for public schools.[30] Although Congress did not dedicate Section 29 lands separately for "purposes of religion," Alabama has continued to adhere to the provisions of the Northwest Ordinance that relate religion and public education, at least until precluded by decisions of this Court. Thus, the 1927 Alabama School Code began with the following explanation of Section 3 of the Northwest Ordinance relating it to the formation of Alabama and the establishment of its public education system.

THE PARENT OF THE EDUCATIONAL LAWS OF THE SEVERAL STATES AND OF THE UNITED STATES OF AMERICA

> Religion, morality and knowledge being necessary to good government and the happiness of mankind,

[29] The Enabling Act for Alabama of 1819 required substantial conformity with the Northwest Ordinance of 1787.

> . . . when formed shall be republican, and not repugnant to the principles of the ordinance of the thirteenth of July, one thousand seven hundred and eighty-seven, between the people and States of the territory northwest of the river Ohio, so far as the same has been extended to the said territory, by the articles of agreement between the United States . . .

F. Thorpe, 1 *Constitutions, Charters, and Other Organic Laws* 92, 93 (1909). (A. 95a, 97a).

[30] Ala. Code § 16-20-1 (1977); see *Opinion of the Justices* 252 Ala. 26, 39 So.2d 294 (1949).

schools and the means of education shall forever be encouraged.

(Note of Explanation)

The above is part of Article 3 of the Great Ordinance of 1787 which provided for the government of the Territory of the United States northwest of the Ohio River. This Ordinance is two years older than the Constitution of the United States. It created the first territorial government in the United States. It formed the model for all other Acts of Congress providing for territorial government, especially the Acts creating the Mississippi and Alabama Territory, which Acts were approved April 7, 1798, May 10, 1800, April 24, 1802, March 3, 1817, and April 20, 1818. *In this Great Ordinance of 1787 it was ordained that such articles should be considered as a compact between the original Thirteen States and the people thereof and the Northwestern Territory created thereby and the people thereof.* The above quoted provision was a part of Article 3 so ordained. The Acts creating the Mississippi and Alabama Territory provided that the people of such Territory "*shall be entitled to and enjoy all and singular the rights, privileges and advantages granted to the people of the Territory of the United States northwest of the River Ohio.*" The Acts of the various territorial Legislatures followed to a considerable extent the provisions embraced in the Great Ordinance of 1787; and hence it became the germ of source of the laws relating to education of the several States thereafter created. Parts of this territory northwest of the Ohio River prior to this Great Ordinance was claimed by Virginia and others of the original Thirteen States. It was ceded to the United States before the Constitution, and the territorial government created by this Great Ordinance in 1787. For these reasons, it is of next importance to the Declaration of Independence, the Constitution of the United States, and the Constitutions of the several States.

Ala. School Code (1927) (emphasis added).

The Northwest Ordinance has been virtually overlooked in this Court's modern discussion of the Religion Clauses. Other than a passing reference in *Jones v. City of Opelika*, 316 U.S. 584, 622 (Murphy, J., dissenting) (1942), associating the Northwest Ordinance with the Virginia Statute for Religious Freedom and the First Amendment, the only other reference is by Justice Douglas concurring in *Engel v. Vitale*, 370 U.S. 421 (1962), noting that the Northwest Ordinance "antedated the First Amendment." 370 U.S. at 443, N. 9. As a result there has been the uncritical assumption that Founders had not given much thought to religion and public education. See *Schempp*, 374 U.S. at 238 (Brennan, J., concurring).

The fact that the Northwest Ordinance has been overlooked appears to involve the disassociation of the Ordinance from the First Congress. While first enacted by the Continental Congress, the First Congress reenacted the Ordinance. The action of the First Congress cleared any possible doubts about the constitutional power to pass the Ordinance.[31] Nevertheless, in *Dred Scott v. Sanford*, 19 Howard 393 (1856), Chief Justice Taney disassociated the Act from the United States Congress. He viewed the Northwest Ordinance as an act of the States, not of Congress.[32] In this view, "the act of 1789 was no exercise of

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[31] At the time the Northwest Ordinance in 1787 was passed, no one challenged the power of the Continental Congress to enact it. *The Federalist*, No. 38 at 241 (Mod. Lib. ed.). James Madison, however, said the act was passed "without the least color of constitutional authority." *Id.* Madison's comment was made not to denounce the act but to argue for the enumerated powers in the Constitution. See *Id.* at 242. At approximately the same time that the Continental Congress was enacting and implementing the Northwest Ordinance, James Madison was proposing additions to the powers of Congress that would clarify Congress' authority for doing so. *See* Fehrenbacher, *The Dred Scott Case* 83 (1978). The essence of Madison's proposals was adopted in modified form in Article IV of the Constitution, *Id.* at 83-84.

[32] Fehrenbacher, *supra*, at 438-439.

power at all, but merely an acceptance of a decision previously made." [33] This provided "the way for invalidating the Missouri Compromise restriction without challenging the legitimacy of the more venerable Northwest Ordinance." [34]

As an act of the First Congress, the implications of the Northwest Ordinance for the Religion Clauses are significant. Of the six articles in the Northwest Ordinance, two related to religion. In addition to Article 3, the provision relating schools and religion, Article 1 provided for religious freedom.

> Art. 1. No person demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in said territory." (A. 21a, 26a).

Article 3 relating to religion and schools, and Article 1 on religious freedom, should be read *in pari materia*. These were two of the six conditions for admitting states into the Confederacy, see *The Federalist*, No. 38 at 241, and later into the Union.[35] Article I guaranteed religious freedom in the states, beginning with the admission of Ohio in 1803. Typically, the Enabling Acts for states admitted pursuant to the Northwest Ordinance, including Alabama's, provided that the state's Constitution was to conform to the Northwest Ordinance. Congress had the power to refuse to admit states if their proposed Constitutions did not so conform. *Permoli v. 1st. Municipality of New Orleans*, 3 Howard 589, 609 (1845);

[33] *Id.* at 372.

[34] *Id.* at 373.

[35] In the Southern Territories the prohibition of slavery found in the Northwest Ordinance was deleted. The Act establishing the Mississippi Territory stipulated: "in all respects similar to that now exercised in the Territory Northwest of the river Ohio, excepting and excluding the last article* . . ." Laws of the United States—Relating to the Public Lands 434, 435 no. 76 (1828).

* An editorial note in the 1828 compilation states: "Article 6, which provides that there shall be neither slavery nor involuntary servitude otherwise than in the punishment of crimes, &c." *Id.*

Coyle v. Smith, 221 U.S. 559, 568 (1910). Although the states were free to change their constitutions after admission to the Union, *Permoli*, *supra* at 609; *Coyle*, *supra*, at 568, the fact that these states were settled on the basis of religious freedom effectively guaranteed the continuation of such practices and may well have influenced the movement toward disestablishment in the original states. One can only speculate whether, if Congress had failed to enforce the religious freedom provisions as it did the slavery provisions of the Northwest Ordinance, the nation would have experienced a domestic war over religion as it did over slavery.[36]

It would seem difficult to argue that the First Congress, which proposed the Religion Clauses of the First Amendment and which extended religious freedom to the territories, acted unconstitutionally by promoting "Religion, morality and knowledge" in public education and setting aside land "for purposes of religion." The leading advocate of strict separation, Professor Leo Pfeffer, has found these practices inconsistent with the First Amendment.[37] However, he has not had to confront the conflict between the historical facts and his theory. Relying on a secondary source, he has erroneously opined "that after the Constitution and the First Amendment were adopted no more public land was granted for the support of religion under the Ordinance." [38] Again, ap-

[36] Among the possible causes of an internal war among states, *The Federalist Papers* listed first the possible territorial disputes, in particular potential disputes over the Western Territory if the Constitution were not adopted. *The Federalist* No. 7 at 34-35 (Hamilton) (Mod. Lib. ed.). This Court has often noted the Religion Clauses were drafted in reaction to the religious wars of Europe. See *Everson v. Board of Education*, 330 U.S. 1, 8-9 (1947).

[37] Pfeffer, *Church, State, and Freedom* 108 (1953).

[38] "Moreover, notwithstanding the committee's action in 1785, Congress granted tracts of land for the support of religion, as well as for schools, though it is important to note that after the Constitution and the First Amendment were adopted no more public land

parently relying on a secondary source, he erroneously suggested that James Madison opposed *any* grants of land for purposes of religion because Madison was opposed to the unsuccessful attempt in 1785 to dedicate lands for the "purposes of religion."[39] The 1785 proposal, which Madison opposed and which was not adopted, differed from later successful provisions. The 1785 provision would have dedicated land not simply "for purposes of religion," but would have set apart a district of land in each township "for the support of religion . . . *of the majority of male residents.*" (Emphasis added). (A. 1a, 5a). Later provisions simply set apart land "for purposes of religion," the proceeds of which were distributed equally among the various sects.[40] Most significantly,

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was granted for the support of religion under the Ordinance.[141]" *Id.* at 108. The only authority cited in support of his statements per Note 141, is a reference to R. Butts, *The American Tradition in Religion and Education* 68-71 (1950).

[39] Without citation, Pfeffer quotes Madison from a letter to Monroe, May 29, 1785:

> How a regulation so unjust in itself, so foreign to the Authority of Congress, so hurtful to the sale of the public land, and smelling so strongly of an antiquated Bigotry, could have received the countenance of a Committee is truly a matter of astonishment.

L. Pfeffer, *Church, State and Freedom* 108 (1953). Pfeffer may have relied on Butts, who quotes the same single line. *The American Tradition in Religion and Education* at 70. The entire paragraph relating to religion is as follows:

> It gives me much pleasure to observe by 2 printed reports sent me by Col. Grayson, that, in the latter, Congress had expunged a clause contained in the first, for *setting apart a district of land in each Township for supporting the Religion of the majority of inhabitants.* How a regulation so unjust in itself, so foreign to the Authority of Congress, so hurtful to the sale of the public land, and smelling so strongly of an antiquated Bigotry, could have received the countenance of a Committee, is truly matter of astonishment" 1 *Writings of James Madison* 153, 154 (1865). (emphasis added)

[40] See text of Ohio statute, *supra*, at 22.

Madison was a member of the committees that in fact set aside lands *for purposes of religion*, without reference to the will of the majority.[41] Given the actions of the First Congress as well as those of Madison, there must be an extremely strong presumption that those practices of Congress that directly promoted religion were not unconstitutional.

The issue of Congress' past practices, of course, is not directly before this Court. Moreover, some would contend that certain practices regarding religion, although once constitutionally permissible, might not be considered so today. See *Marsh v. Chambers*, —— U.S. ——, 103 S.Ct. at 3349 (Brennan, Jr., dissenting). Nevertheless, the virtually unnoticed fact that Congress laid the foundation for public school education within the context of religion and morality is relevant to the constitutionality of meditation-or-voluntary-prayer statutes. By comparison, these modern-day statutes are only the most modest form of accommodation for religion. In judging these

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[41] Madison was a member of the five-man committee which recommended on July 10, 1787 the Parson's Land contract with the reservation of Lot 29 "perpetually for the purposes of religion." 32 Journal of the Continental Congress 311, 312. Following passage of the Northwest Ordinance on July 13, 1787, other action was taken regarding the Parson's Land Contract on July 14, 1787. 32 Journal of Continental Congress 346-47. On July 23, 1787, the provisions of the Parsons Land Contract, without reference to Parsons, were passed on the recommendation by a committee, including Madison. This act set aside Section 29 "perpetually for the purposes of religion." Laws of the United States—Relating to the Public Lands 362 n. 33 (1828). (A. 33a).

Madison was also a member of the three-man committee which on September 3, 1788, recommended giving land to the society for propagating the gospel among the heathens. 34 Journal of Continental Congress 485; 1 Laws of the United States 579 (1815); Laws of the United States—Relating to the Public Lands 399 (1828). (A. 46a). The same three-man committee, including Madison, recommended at the same time that two previously past acts be amended to include the designation of land for the support of religion. 34 Journal of the Continental Congress 540, 541. (A. 43a). (See footnote 21, *supra* on the effect of the recommendation.)

statutes, it is appropriate to recall this Court's observation that ". . . Establishment Clause precedents have recognized the special relevance in this area of Mr. Justice Holmes' comment that 'a page of history is worth a volume of logic.'" *Com. for Public Education v. Nyquist*, 413 U.S. 756, 777 n. 33 (1973).

C. The Free Exercise And Establishment Clauses, Construed Together, Permit Accommodations Of Religion, Such As Meditation-Or-Voluntary-Prayer Statutes, Which Are Not Incompatible With The Private Rights Of Conscience Or The Freedom Of Religious Worship.

1. The logic of strict separation is at odds with the history of accommodation under the Religion Clauses. Not only does the Free Exercise Clause *require* certain accommodations for religious exercise, *Sherbert v. Verner*, 374 U.S. 398 (1963), but the Establishment Clause *permits* accommodations not required by the Free Exercise Clause. See e.g., *Mueller v. Allen*, —— U.S. —— 103 S.Ct. 3062 (1983) (tuition tax credits); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981) (exemption of church-operated school employees from unemployment taxes); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (implied exemption of church-operated school employees from Labor Board jurisdiction); *Gillette v. United States*, 401 U.S. 437 (1971) (exemption of religious objectors from compulsory military service); *Walz v. Tax Commission*, 397 U.S. 664 (1970) (property tax exemptions for religious organizations); *Zorach v. Clauson*, 343 U.S. 306 (1952) (off-premises public school release time programs); *Quick Bear v. Leupp*, 210 U.S. 50 (1908) (use of Indian trust monies for sectarian education).

Alabama's meditation-or-voluntary-prayer statute is a permissive, and possibly a required, accommodation of religious exercise. As a result of the Court of Appeals decision in this case on the issue of teacher-initiated

prayer,[42] the school officials will apparently be required to prohibit teachers from praying in the classroom. Previously, state and local officials had remained neutral, neither approving, prohibiting, nor even commenting on whether a teacher prayed. In all likelihood, some administrators, fearing personal liability and awards for attorneys' fees, will err in the direction of over-extending the mandate of the Court even if it erodes the Constitutional rights of free exercise of individual teachers and students.

While the plaintiffs in this case indicated no objection to student-initiated prayer even during class hours, T. 224 (Nov. 15, 1982), experience has shown such tolerance is unlikely. Hearings before the Senate Judiciary Committee on the so-called "Equal Access" bill have recorded numerous instances of over-zealous school officials suppressing the free exercise and free speech rights of students. School "districts have banned student-initiated extracurricular religious clubs, certain student community service organizations and activities (including dances to benefit the American Cancer Society), student newspaper articles on religious topics, and student art with religious themes. They have even prohibited students from praying together in a car in a school parking lot, sitting together in groups of two or more to discuss religious themes, and carrying their personal Bibles on school property. Individual students have been forbidden to say a blessing over their lunch or recite the rosary silently on a school bus." Report of the Committee on the Judiciary of the U.S. Senate on S. 1059, No. 98-357 (98th Cong., 2d Session) (1984), 11-12. It is understandable that "student witnesses told the Committee that they and their peers viewed the ban on religious speech as evidence of State hostility toward religion." *Id.* at 12.

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[42] This Court denied certiorari on the issue of teacher-initiated prayer, addressed by the Court of Appeals, J.S. 12a-16a, in a companion case, *Board of School Commissioners of Mobile Co. v. Jaffree*, No. 83-7047, cert. denied April 2, 1984.

The Committee Report concluded that the offending "administrators act not from malevolence toward religion but from ignorance of the law and erroneous legal advice." *Id.* at 6. Recognizing that there has been some degree of confusion among school administrators ever since *Engel*, the Committee found that confusion has greatly increased in the last two years since lower federal court decisions holding that school districts must prohibit even extracurricular student-initiated religious discussion.[43] *Id.* at 6-7. A shift in the legal landscape is occurring as the accretion of lower court precedents under the Establishment Clause erodes the rights of students under the Free Exercise Clause. While Congress considers whether to respond by coercing schools to accommodate the religious rights of students through a policy of "equal access," cf. *Widmar v. Vincent*, 454 U.S. 263 (1981), those state statutes which allow a period of silence for meditation or voluntary prayer may be viewed as having already provided an analogous accommodation.

2. The Free Exercise and Establishment Clauses "are to be read together, and in light of" their purpose which "is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end." *Abington School District v. Schempp*, 374 U.S. at 305 (Goldberg, J., concurring). The failure to read the clauses together has created unnecessary tension. See *Thomas v. Review Board*, 450 U.S. 707 (Rehnquist, J., dissenting) (1981). Reading the Establishment Clause in isolation from the Free Exercise Clause seems to require total separation and no aid to religion. *See Everson v. Board of Education*, 330 U.S. 1, 15 (1947). Reading the two together as a single standard, the Religion

[43] *Brandon v. Guilderland Board of Education*, 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981); *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir., 1982), cert. denied 103 S.Ct. 800 (1983).

Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, —— U.S. ——, 104 S.Ct. at 1359 (1984).

In *Lynch v. Donnelly*, the Court gave new life to the theory of accommodation. In fact accommodation has characterized the holdings of numerous cases simply because this Court has "refused to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*." *Id.* at 1361 quoting *Walz*, 397 U.S. 664, 671 (with emphasis supplied by Court). Nevertheless, for lack of a conceptual framework to support its historical approach, the accommodation theory has previously proven to be largely an ad-hoc deviation from the strict separation, no aid, and strict neutrality themes.

It seems more than a coincidence that the revival of the concept of accommodation in *Lynch* is linked to the reliance for the first time in modern religion cases on Justice Joseph Story's writings.[44] Story's statements are not merely the views of one among many commentators. Appointed by Madison, whose views have been considered so important on the Religion clauses, Story relied heavily in his interpretations of the Constitution on *The Federalist Papers*, written by Madison, Hamilton and Jay. Sitting on the Supreme Court for thirty-four years, he spent twenty-four years in close collaboration with Chief Justice Marshall, who himself played a part in Virginia's struggle over religious liberty.[45] Finally, he was the first

[44] The dissent in *Marsh v. Chambers* cites Story, with disapproval. —— U.S. ——, 103 S.Ct. at 3349 (Brennan, J., dissenting). Prior to that, there is only a passing notation of Story's work in *McGowan v. Maryland*, 366 U.S. 420, 441 (1961).

[45] As a member of the Virginia legislature, Marshall supported, against Madison and Jefferson, the "Bill for establishing a provision for the teachers of the Christian religion," Cobb, *The Rise of Religious Liberty in America*, at 495 (1902).

to write for this Court on the issues of church-state relationships. See *Terrett v. Taylor*, 9 Cranch 43 (1815) and *Vidal v. Girard's Executors*, 2 Howard 127 (1844).

Most importantly, Story's views were not simply idiosyncratic, but were grounded in the events related to the Northwest Ordinance. The Northwest Ordinance was largely the work of Nathan Dane of Massachusetts,[46] with whom Joseph Story became closely associated.[47] Story, who praised the Ordinance "for its masterly display of the fundamentals of civil and religious liberty," 3 Story, *Commentaries* § 1318, 191, said that "[t]he third [section] provides *for the encouragement of religion*, and education, and schools . . ." *Id.* at § 1318, 192. (emphasis added). The fact that Story's discussion of religious liberty coincided with the principles of the Northwest Ordinance and that the Ordinance represented a "consensus upon basic republican goals and principles," [48] are sufficient reasons to give great weight to the discussion by Story.

In *Terrett v. Taylor*, 9 Cranch 42 (1815), Justice Story, writing for a unanimous Court, specifically addressed the Virginia experience. Story ruled that the legislature of the state of Virginia lacked the authority to expropriate land formerly granted to the Church of England. Jefferson had carried the logic of strict separation to the point of influencing the Virginia legislature to pass a statute in 1801 which, asserting its right to all the property of the Episcopal Churches in the state, had directed that

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[46] Fehrenbacher, *supra*, N. at 79; 3 Story, *supra* N. a5 17, N. 1.

[47] Dane endowed a chair for Story at the Harvard Law School and prescribed that Story write a series of publications, which included his *Commentaries on the Constitution.* See Sutherland, *The Law at Harvard*, 93-107 (1967).

[48] Berkhofer, *supra*, n. 20 at 261.

Church property be sold and the proceeds given to the poor.[49] Speaking for the Court, Justice Story said:

> . . . although it may be true that "religion can be directed only by reason and conviction, not by force or violence," and that "all men are equally entitled to the free exercise of religion according to the dictates of conscience," as the bill of rights of Virginia declares, yet *it is difficult to perceive how it follows as a consequence that the legislature may not enact laws more effectively to enable all sects to accomplish the great objects of religion* by giving them corporate rights for the management of their property, and the regulation of their temporal as well as spiritual concerns. Consistent with the constitution of Virginia the legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe. But *the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties*, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead. *Id.* 48-49. (Emphasis added.)

This *Court's original understanding* of the First Amendment's Religion Clauses was that of no preference among sects. This allowed "the Catholic and the Protestant, the Calvinist and the Armenian, the Jew and the Infidel [to] sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship." 3 Story, § 1879, at 667. (A. 110a).

Any hesitancy to give deference to Story's views may be due to his unequivocal statements about this country

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[49] J. McClellan, "Christianity and the Common Law" in *Joseph Story and the American Constitution*, 129 (1971).

being a Christian nation. The unedited version of a quote which appears in *Lynch*, 104 S.Ct. at 1361, is as follows:

> The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government. 3 Story, § 1877, 664 (A. 107a).

Taken by itself, this much might appear to us today to constitute intolerance. The Religion Clauses, however, were understood as permitting both the promotion of religion and the protection of conscience.

> But the duty of supporting religion, and especially the Christian religion, is very different from the right to force the conscience of other men, or to punish them for worshipping God in the manner which they believe their accountability to him requires. *Id.* § 1876, 664 (A. 106a).

3. As is apparent from *Lynch* and *Marsh*, there is beginning to be a realization that the strict separation and related theories do not accurately reflect the meaning of the Religion Clauses. The Court's previous approach of "limit[ing] its historical inquiry to the particular practice under review," *Lynch v. Donnelly*, 104 S.Ct. at 1383 (Brennan, J., dissenting), has given rise to a theory of the Religion Clauses at odds with the history. As the history is recovered and becomes part of the case law, see, e.g. *Lynch v. Donnelly*, 104 S.Ct. 1355, *Marsh v. Chambers*, 103 S.Ct. 3330, some will impugn the argument from history—formerly the justification for strict separation, see *Everson, supra*—and will prefer the theory created by a distorted history on the basis that "practices which may have been objectionable to no one in the time

of Jefferson and Madison may today be highly offensive to many persons . . ." *Marsh*, 103 S.Ct. at 3348 (Brennan, J., dissenting and quoting Brennan, J., concurring in *Schempp*, 374 U.S. at 240-241).

A theory of accommodation is also supportable by a *structural*, as distinct from an historical, view of the Religion Clauses.[50] The understandings of Story who spoke of "encourag[ing] the Christian religion generally," of Madison who sought to promote a "multiplicity of sects," and of Jefferson who insisted that matters of religion were left to the states, all formerly came to the same result of leaving such matters to the states. See *Barron v. Baltimore*, 7 Peters 243 (1833); *Permoli v. New Orleans*, 3 Howard 589 (1845). Assuming arguendo the propriety of incorporating the Establishment Clause as applicable to the states,[51] we submit that a theory of accommodation most accurately addresses the "broad purposes" of all the Framers.

Even if it were possible to adhere to Jefferson's strict theory of separation, which he himself did not,[52] this Court's cases have reversed Jefferson's structural view of strict separation. Jefferson advocated strict separation at the national level and, therefore, refused on constitutional grounds to issue Thanksgiving Day proclamations,[53] a practice which this Court has assumed in dicta to be constitutional. *Lynch v. Donnelly*, 104 S.Ct. at 1360. Although as a Virginian Jefferson worked successfully for separation, he held, as reflected in his second in-

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[50] See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); Black, *Structure and Relationship in Constitutional Law* (1969).

[51] Apellants understand the Court's grant of review to exclude the issue of the Fourteenth Amendment's incorporation of the Establishment Clause which was discussed in the lower court opinions.

[52] See *Cord, Separation of Church and State: Historical Fact and Current Fiction*, 36-47 (1982).

[53] *Id.* at 39-40.

agural address, that religion was a matter to be left strictly to the states.[54] Given this Court's incorporation of the Establishment Clause, *Everson v. Board of Education*, *supra*, there is little relationship between this Court's understanding of the Religion Clauses and Thomas Jefferson's constitutional philosophy.

As long as the Establishment Clause was not applicable to the states, its meaning presented few practical problems. When *Engel* and *Schempp* generated public opposition, it was assumed by some that the controversies were due not to any novel understanding of the Religion Clauses, but to the novelty of applying well-established principles to the states. Most Establishment Clause cases have seemed to involve essentially state issues, such as aid to religious schools or religious influence in public schools. In *Marsh v. Chambers*, *supra*, and *Lynch v. Donnelly*, *supra*, this Court addressed issues (legislative chaplains and nativity displays) which, while raised in state cases, had implications for practices of Congress and the President. As this Court has begun to consider more fully the Religion Clauses as applied to the national government, it has become clearer that it is not "possible or desirable to enforce a regime of total separation . . . ." *Lynch*, 104 S.Ct. at 1359, quoting *Nyquist*, 413 U.S. 756, 760 (1973). While the issue in this case differs from those in *Lynch* and *Marsh*, with their national implications, it cannot reasonably be contended that the Establishment Clause imposes a more rigid standard on issues of concern primarily to the states, than on those of concern also to the national government.

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[54] "In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the General Government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to it, but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities acknowledged by the several religious societies." T. Jefferson, "Second Inaugural," Mar. 4, 1805, reprinted in *The Presidents Speak*, 19, 20 (1961).

Removing the "incorporation debate" as an issue from this case has revealed several instructive ironies. It was the Congress which promoted religion in public schools with the passage of the Northwest Ordinance. It was Congress' passage of the Northwest Ordinance which was relied on, before the Fourteenth Amendment, to argue that certain basic civil liberties bound the states. See *Permoli v. New Orleans*, 3 Howard 589 (1845); *Dred Scott v. Sanford*, 19 Howard 393 (1856). It was Congress which, through the abortive Blaine Amendment,[55] would have permitted Bible reading in public schools even while prohibiting a state establishment of religion.[56]

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[55] Title 4 Cong. Rec. 5580 (1876) states in pertinent part, that: "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification for any office of public trust under any State. No public property, and no public revenue of, nor any loan of credit by or under the authority of the United States, or any State . . . shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect . . . wherein the particular creed or tenets of any religious or anti-religious sect . . . shall be taught; and no such particular creed or tenets shall be read or taught in any school or institution supporting whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect . . . to promote its interest or tenets. *This article shall not be construed to prohibit the reading of the Bible in any school or institution. . . .*" As cited in *Jaffree v. Wallace*, 705 F.2d at 1531, & n. 5. J.S. 9A (emphasis added).

[56] Most of the discussion over the *Blaine Amendment* concerns whether it evidences an understanding by the Congress of the time that the Fourteenth Amendment did not incorporate the Establishment Clause. See *Schempp*, 374 U.S. at 257. No one questions that had the Blaine Amendment passed it would have clearly applied the Establishment Clause to the states. The language, however, indicates an understanding that a prohibition of an establishment of religion is not inconsistent with Bible reading in public schools.

We respectfully submit that the nationalist perspectives of Story and the early Madison, which are bound up with the Northwest Ordinance and rooted in *The Federalist Papers*, should guide this Court in developing a theory of accommodation under the Religion Clauses. *The Federalist Papers*, written in part by Madison and frequently quoted by Story, deem the promotion of a *large* commercial republic and a multiplicity of religious sects essential elements for establishing domestic tranquility.[57] The unique contribution of *The Federalist Papers* in the history of political thought is the theory of pluralism.[58] The fact that established state churches ceased to exist prior to the Fourteenth Amendment, and the intervention of federal courts, pays tribute not only to the good sense of the American people, but to the direction and influence of *The Federalist Papers*.

In all the discussions of Madison's understanding of the Religion Clauses, relatively little attention has been paid to his writing in *The Federalist Papers*. *Larson v. Valente*, 456 U.S. 228, 245 (1982), mentioned Madison's discussion in *Federalist* No. 51 of a "multiplicity of interests" as a protection for religious rights, but without reference to Madison's discussion in *Federalist* No. 10, which concerns the danger of factions. Madison defined a "faction" as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *Federalist* No. 10 at 54 (Mod. Lib. ed.) He clearly included religious groups in this definition. Nevertheless, his approach when dealing with the Constitution differed

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[57] Shklar, "Publius and the Science of the Past," 86 Yale Law Journal, 1273, 1291 (1977).

[58] Mace, *Locke, Hobbes, and the Federalist Papers*, xii (1978); See also Diamond, "The Federalist," in Strauss et al., *History of Political Philosophy* (1963).

in part from his support of the Declaration of Rights for his own state of Virginia. His solution to the dangers posed by religious and other factions as a national, and therefore a constitutional problem, was to eliminate the "*effects*", rather than the "*causes*." Pluralism would be achieved by multiplying factions dispersed throughout a large commercial republic, as opposed to the anti-Federalist (Jeffersonian) advocacy of small "virtuous religiously dominated republics".[59] Madison summarized the solution to factionalism as something which is more subtle than today's popular notion of "pluralism":

> The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A *religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. . . .*
>
> In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans, ought to be our zeal in cherishing the spirit and supporting the character of Federalists. *Federalist* No. 10 at 61-62 (Mod. Lib. ed.) (emphasis added)

It would not have been at all inconsistent for Madison to support Congress' promotion of religion without dis-

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[59] The anti-Federalists favored small republics, and "urged that the new rulers should turn their attention to the *task, which surpasses the framing of constitutions, of fostering religion and morals, thereby making government less necessary* by rendering 'the people more capable of being *a Law to themselves.*' Such self-government was possible, however, only if the center of gravity of American government remained in the states." Storing, *What the Anti-Federalists Were For* (1981) at 23 (footnote omitted; emphasis added in part).

crimination among sects as a means of diluting the influence of the majority religious sect in each locale. The "secular purpose" would have been both the protection of religious minorities and political stability. The rationale clearly stated for confining religious matters to the states has nothing to do with states' rights, but rather with protecting the national government from religious pressures.

The dangers of religious factionalism described by Madison and basically solved through the workings of our constitutional republic are once again very much present. Today, the flame of religious zeal is everywhere in evidence in matters that are also political. But this activity is not, as intended by Madison's understanding of the Constitution, confined to particular parts of the republic. The availability of electronic technology has undoubtedly facilitated the formation of national factions, religious and others. It must be candidly admitted, however, that mobilization of religious pressures on national legislation is surely a result of the nationalization of religious issues. A growing solidarity among various denominations, some opposed to restoring school prayer even by a constitutional amendment, is seeking some accommodation for the free exercise rights of students. Whether they will succeed is less significant than the fact that they are trying. What concerned Madison was not whether a faction constituted a majority or minority, but whether it was able to become a national movement. See *Federalist* No. 10.

The way to guarantee that the Constitution will last for the ages is not by wandering from the wisdom of the Founders, especially on issues of religion. We respectfully suggest that this case gives the Court an opportunity to defuse some of the untoward effects of religious factionalism which have followed from *Engel* and *Schempp*. We suggest, therefore, that the Court (1) uphold the Alabama meditation-or-voluntary-prayer statute without reliance on the three-part test; (2) limit the overly-broad reading of *Engel* and *Schempp* implicit in the Circuit Court's

voiding of the meditation-or-voluntary-prayer statute; and (3) prescribe accommodation for the rights of religious liberty and of conscience as the touchstone for interpreting the Religious Clauses.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

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